

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	File No. EB-08-SE-819
Midland Radio Corporation)	NAL/Acct. No. 200932100066
)	FRN 0005867551

ORDER

Adopted: October 14, 2009

Released: October 16, 2009

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau ("Bureau") and Midland Radio Corporation. ("Midland"). The Consent Decree terminates an investigation and Notice of Apparent Liability for Forfeiture ("NAL") by the Bureau against Midland for possible violations of Section 302(b) of the Communications Act of 1934, as amended, (the "Act"),¹ and Section 2.803(g) of the Commission's Rules ("Rules")² regarding the marketing of General Mobile Radio Service (GMRS) transmitters equipped with voice scrambling technology.
2. The Bureau and Midland have negotiated the terms of the Consent Decree that resolve this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.
3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree, which terminates the investigation and cancels the NAL.
4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether Midland possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.
5. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i) and 503(b) of the Act,³ and sections 0.111 and 0.311 of the Rules,⁴ the Consent Decree attached to this Order **IS ADOPTED**.
6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED** and the Notice of Apparent Liability for Forfeiture **IS CANCELLED**.

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(g)..

³ 47 U.S.C. §§ 154(i) and 503(b).

⁴ 47 C.F.R. §§ 0.111, 0.311.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to counsel for Midland, Mitchell Lazarus, Peter Tannenwald and Davina Sashkin, Fletcher, Heald & Hildreth, PLC, 1300 North 17th Street, 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau

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Midland Radio Corporation)	NAL/Acct. No. 200932100066
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CONSENT DECREE

The Enforcement Bureau ("Bureau") and Midland Radio Corporation ("Midland"), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau's investigation into whether Midland violated Section 302(b) of the Communications Act of 1934, as amended ("Act"),¹ and Section 2.803(g) of the Commission's Rules ("Rules")² by marketing General Mobile Radio Service ("GMRS") transmitters equipped with voice scrambling technology.

I. DEFINITIONS

1. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) "Act" means the Communications Act of 1934, as amended 47 U.S.C. §§ 151 *et seq.*
 - (b) "Adopting Order" means an Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (d) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (e) "Compliance Plan" means the program described in this Consent Decree at paragraph 9.
 - (f) "Effective Date" means the date on which the Bureau releases the Adopting Order
 - (g) "GMRS" means General Mobile Radio Service.
 - (h) "Investigation" means the investigation commenced by the Bureau's March 9, 2009, Letter of Inquiry³ ("LOI") regarding whether Midland marketed GMRS

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(g).

³ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Midland Radio Corporation (March 3, 2009) .

transmitters equipped with voice scrambling technology, in violation of Section 302(b) of the Act and Section 2.803(g) of the Rules.

- (i) “Midland” means Midland Radio Corporation and its predecessors-in-interest and its successors-in-interest.
- (j) “NAL” means the Notice of Apparent Liability for Forfeiture, *Midland Radio Corporation*, 24 FCC Rcd 8392 (Enf. Bur., Spectrum Enf. Div. 2009).
- (k) “Parties” means Midland and the Bureau.
- (l) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.

II. BACKGROUND

2. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(g) of the Rules prohibits the marketing of radio frequency devices that could not be authorized or legally operated under the current rules. Section 95.183(a)(4) of the Rules⁴ provides in pertinent part that “[a GMRS] station operator must not communicate ... coded messages or messages with hidden meanings.”

3. On March 3, 2009, the Bureau issued a letter of inquiry (“LOI”) to Midland.⁵ The March 3, 2009, LOI directed Midland, among other things, to submit a sworn written response to a series of questions relating to the marketing of GMRS transmitters equipped with a voice scrambling feature. Midland responded to the March 3, 2009, LOI on April 2, 2009.⁶ On June 25, 2009, the Bureau issued a Notice of Apparent Liability for Forfeiture (“NAL”)⁷ proposing that Midland be held liable for a forfeiture of \$21,000 under Section 503(b)(1)(B) of the Act, and ordered the Company either to pay the proposed forfeiture or file a written response within thirty (30) days of the NAL release date stating why the proposed forfeiture should be reduced or canceled.⁸

III. TERMS OF AGREEMENT

4. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

5. **Jurisdiction.** Midland agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

⁴ 47 C.F.R. § 95.183(a)(4).

⁵ See March 3, 2009, LOI.

⁶ See Letter from Peter Tannenwald and Davina Sashkin, Counsel for Midland Radio Corporation, to Thomas D. Fitz-Gibbon, Esq., Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (April 3, 2009) (“LOI Response”).

⁷ *Midland Radio Corporation*, 24 FCC Rcd 8392 (Enf. Bur., Spectrum Enf. Div 2009).

⁸ The Bureau has extended the response time until September 10, 2009.

6. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the date on which the Bureau releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

7. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its investigation and to cancel its NAL. In consideration for the termination of said investigation, Midland agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in this investigation through the Effective Date of the Consent Decree, the NAL, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against Midland concerning the matters that were the subject of the investigation. The Bureau also agrees that it will not use the facts developed in this investigation through the Effective Date of this Consent Decree, the NAL, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Midland with respect to Midland's basic qualifications, including its character qualifications, to be a Commission licensee or hold Commission authorizations.

8. **Importing and Marketing GMRS Transmitters.** Midland agrees that every GMRS transmitter imported or marketed in the United States by Midland on or after the Effective Date of this Consent Decree shall be compliant with Part 95 of the Rules before importation and marketing by Midland.

9. **Compliance Plan.** For purposes of settling the matters set forth herein, Midland agrees to maintain a Federal Communications Commission Regulatory Compliance Plan ("FCC Compliance Plan") related to Midland's future compliance with the Act, the Commission's Rules, and the Commission's Orders. The FCC Compliance Plan will include, at a minimum, the following components:

- (a) **FCC Compliance Procedures.** Midland shall develop and update as necessary appropriate FCC Compliance Procedures. Relevant Midland personnel shall be made aware of the FCC Compliance Procedures and shall be required to follow them. The FCC Compliance Procedures will, among other things, address the importance of evaluating all new product features and functions to ensure compliance with applicable Commission Rules. Midland shall also maintain a relationship with outside regulatory counsel familiar with FCC regulations and interpretations to ensure that Midland remains current with respect to such matters.
- (b) **Compliance Officer.** Midland shall designate an FCC Compliance Officer ("Compliance Officer") who will administer the FCC Compliance Plan, supervise Midland's compliance with the Commission's Rules, interpretations thereof, and this Consent Decree, and serve as the Midland point of contact for all FCC-related compliance matters. The Compliance Officer will be assigned responsibility within Midland for determining whether features and functions incorporated into products marketed by Midland in the United States are in compliance with FCC Compliance Procedures.

- (c) **Review and Monitoring.** Midland will review the FCC Compliance Plan annually to ensure that it is maintained in a proper manner and continues to address the objectives set forth therein.
- (d) **Compliance Reports.** Midland will file compliance reports with the Commission three months, twelve months and twenty four months after the Effective Date. Each compliance report shall include a compliance certificate from an officer, as an agent of Midland, stating that the officer has personal knowledge that Midland has established operating procedures intended to ensure compliance with this Consent Decree, together with an accompanying statement explaining the basis for the officer's compliance certification. All compliance reports shall be submitted to the Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. All reports shall also be submitted electronically to Thomas Fitz-Gibbon at Thomas.Fitz-Gibbon@fcc.gov, Neal McNeil at Neal.McNeil@fcc.gov and to Kathy Berthot at Kathy.Berthot@fcc.gov.
- (e) **Termination.** Unless stated otherwise, the requirements of this Consent Decree will expire twenty four (24) months after the Effective Date.

10. **Voluntary Contribution.** Midland agrees that it will make a voluntary contribution to the United States Treasury in the amount of fourteen thousand dollars (\$14,000). The payment will be made within 30 days after the Effective Date of this Consent Decree. The payment must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced in the caption to the Adopting Order. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Midland will also send electronic notification on the date said payment is made to Thomas.Fitz-Gibbon@fcc.gov and Kathy.Berthot@fcc.gov.

11. **Waivers.** Midland waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order adopting the Consent Decree without change, addition, modification, or deletion. Midland shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. Midland further shall retain the right to seek a change in any existing Commission Rules or to challenge any future Commission interpretation of its Rules regarding what constitutes coded messaging on GMRS devices. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Midland nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Midland shall waive any statutory right to a trial *de novo*. Midland hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

12. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

13. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which Midland does not expressly consent) that provision will be superseded by such Commission rule or Order.

14. **Successors and Assigns.** Midland agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

15. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders.

16. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

17. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

18. **Authorized Representative.** Each Party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

19. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau

Date

Eric Schenck
Vice President-Finance
Midland Radio Corporation

Date